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Supreme Court, U.S.
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No. 00-1189

In the Supreme Court of the United States

W. FOX MCKEITHEN, et al.,
Petitioners,

v.

UNITED STATES FIDELITY & GUARANTY CO., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Brief in Opposition contains at least 77 erroneous, misleading, or unsupported statements. There is neither time nor space to correct all of the inaccuracies. Petitioners will correct the most important errors.

I. THE PETITION RAISES IMPORTANT LEGAL ISSUES.

The Brief in Opposition argues that this case is "essentially a challenge to factual findings of the Court of Appeals." Opp. at 5. However, the two key questions presented by the Petition are issues of law. The first question asks whether the Court of Appeals should have applied the Takings Clause in a case where no identifiable property interest was implicated. The second question asks whether the Court of Appeals properly granted summary judgment when the Insurers failed to present any evidence to support essential elements of their claim.

This case came to the Court of Appeals on appeal from the District Court's summary judgment dismissing the Insurers' claims because the Insurers failed to support their claims. Thus, the Court of Appeals could only reverse the District Court's summary judgment in favor of the State Officials if the Insurers supported every element of their claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

In addition, the Court of Appeals could only reverse the District Court's denial of the Insurers' motion for summary judgment if the Insurers supported every element of their claim and there were no contested issues of fact. Fed. R. Civ. Proc. 56(c). If the Insurers failed either requirement,

the Court of Appeals erred in granting summary judgment to the Insurers. Therefore, the Petition does not ask this Court to analyze or weigh the facts. The Petition merely asks this Court to determine whether the Insurers provided factual support for every essential element of their claim, and whether any of those facts are contested.

A. Can There Be a Taking Without an Impacted Property Right?

The Brief in Opposition argues that Act 188 impacts an identifiable property right. However, the clear language of Act 188 **never** impacted any property interest. Moreover, the Insurers **never** alleged in either their original or amended complaint that Act 188 impacted any property interest. Finally, the Insurers **never** submitted any affidavits or evidence that Act 188 impacted any property interest.

The Insurers never even suggested an identifiable property interest until they drafted their wholly unsupported argument in their Reply Brief to the Court of Appeals. However, there simply is no specifically-identifiable fund that is impacted by Act 188 regardless of the Insurers' imaginative arguments concerning the Insurers' source of funds for paying the assessment.

The clear and undisputed language of Act 188 does not target any fund. As the District Court found:

> The State of Louisiana has little or no interest in how the assessed insurance companies acquire the means with which to pay the assessment; the state's interest is in having a second injury fund in an amount

> sufficient to pay benefits for each individual year.

Pet. App. at 36a.

Similarly, Justice Kennedy found that the Coal Act did not violate the Takings Clause because that statute did not specify the means necessary for the company to comply with the assessment:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. . . . It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. **The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so.**

Eastern Enterprises v. Apfel, 524 U.S. 498, 540, 118 S.Ct. 2131, 2154 (1998) (Kennedy, J., concurring) (emphasis added). Thus, Justice Kennedy would not find a violation of the Takings Clause in this case because the Insurers failed to establish the existence of an element essential to their case – Act 188 does not impact any identifiable property interest.

In an attempt to bolster their argument, the Insurers rely on Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840

(1934), to argue that their insurance contracts are the property right impacted by Act 188. Opp. at 9. However, Lynch and the two cases on which it relies stand solely for the proposition that rights against the United States arising out of a contract with the United States are protected by the Takings Clause of the Fifth Amendment. 292 U.S. at 579, 54 S.Ct. at 843. Lynch, therefore, has no application to this case because the Insurers have no contract with the State of Louisiana.

B. Can There Be a Taking Without an Adverse Economic Impact That Interferes with Reasonable Investment-backed Expectations?

1. The Insurers have always been contractually obligated to pay second injury benefits.

The Brief in Opposition argues repeatedly that the benefits-based assessment is disproportionately applied to the Insurers because it imposes a new liability "where they had never previously borne any such responsibility, Opp. at 11:

> (1) the Insurers "*had not borne any responsibility for second injury losses paid by the SIF*"; Id.
>
> (2) "insurers had never borne *any* SIF cost obligation"; Id., and
>
> (3) "employers [should] continue to bear the full costs of the SIF system as they have in the past." Opp. at 12.

The constant references to "SIF costs" are carefully crafted to obscure the fact that the Insurers have always been contractually obligated to pay benefits for second injuries. Indeed, the Insurers cannot deny that even prior to the creation of the Second Injury Fund, they voluntarily accepted premiums to provide benefits for second injuries; benefits for which they are now reimbursed by the Second Injury Fund. Thus, contrary to the skillful wording of the Brief in Opposition, second injury benefits are not a new liability. The Insurers have always been contractually obligated to pay them.

2. Two distinct windfalls to the Insurers prevent any adverse economic impact.

The Petition sets forth two distinct windfalls the Insurers received as a result of the Second Injury Fund. Pet. §§ II.B.1 and II.B.2. at 13-16. These windfalls prevented or, at the very least, mitigated any adverse economic impact to the Insurers.

The Brief in Opposition states that the Insurers never benefitted from the Second Injury Fund, and that they never received a windfall. Opp. at 4-5. However, those arguments are supported solely by the affidavit of Mr. Peter Barth, the Insurers' expert, who stated that the Insurers collected lower premiums as a result of the SIF. See Opp. at 4 n.2. The Brief in Opposition states that Mr. Barth's testimony was uncontradicted. Id. However, Mr. Barth's testimony on this point is directly contradicted by the testimony of Mr. James Campbell: "The plaintiffs maintain that they gave the employers a reduction in premiums. There is no evidence that the employers of Louisiana received such a reduction." Pet. App. E at 57a.

Thus, the Court of Appeals erred in granting summary judgment to the Insurers because there is a material issue of fact as to whether the Insurers suffered any adverse economic impact that interfered with their reasonable investment-backed expectations.

Moreover, a reduction in premiums only resolves the Insurers' windfall as explained in Section II.B.2 of the Petition. A reduction in premiums does not resolve the Insurers' windfall as explained in Section II.B.1 of the Petition.

The Insurers attempt to resolve the II.B.1 windfall by arguing that the State Officials raised the claim too late. The Insurers cite two cases which hold that appellants cannot raise arguments in a petition for rehearing. However, the State Officials were not appellants, rather the State Officials were appellees. Thus, the cases cited by the Insurers are inapplicable.

3. Act 188 does not "reachback" before 1974.

The Brief in Opposition claims that Act 188 violates the Takings Clause because it assesses "benefits paid under contracts entered into *before* the original statutory scheme was created." Opp. at 11. This statement is clearly erroneous and illustrates a fundamental flaw in the Insurers' analysis.

Prior to the Second Injury Fund, the Insurers received premiums to cover ALL workers' compensation claims: first injuries, second injuries, third injuries, etc. Thus, the Insurers were contractually obligated to pay benefits for "second injuries." After the Second Injury Fund was created, benefits for "second injuries" arising out of pre-Second Injury

Fund contracts were reimbursed by the Second Injury Fund. However, the Insurers never paid any assessment for those reimbursements. The Insurers clearly got something for nothing; they received premiums to provide benefits they did not have to pay.

The fundamental flaw in the Insurers' analysis is that they believe they should continue to receive something for nothing rather than be assessed on pre-Second Injury Fund contracts.

II. BOTH COURTS WHICH HEARD THE INSURERS' CONTRACTS CLAUSE CLAIM HAVE DISMISSED IT.

The Brief in Opposition states without any support that a favorable Takings Clause decision would not resolve the dispute over the constitutionality of the statute because the Insurers raised a Contract Clause claim. The Insurers cite no cases to support their claim.

Two judges that have heard the Insurers' Contract Clause claim. Both dismissed the claim. It is extremely unlikely that the Insurers would be able to prevail on a Contract Clause claim in this case.

III. CONCLUSION

The Insurers argue that this Court should ignore this case because it is fact intensive and unique. However, the Petition raises important issues of federal law. Is the Takings Clause implicated when no identifiable property is impacted? Does a court of appeals properly reverse summary judgment in favor of a defendant and grant summary judgment in favor

of a plaintiff if the plaintiff bears a "substantial burden" and the plaintiff fails to support essential elements of its claim?

As to the mixed issues of fact and law, the Petition does not ask this Court to weigh evidence, rather the Petition merely asks this Court to determine whether the Plaintiffs properly supported the essential elements of their claim, and whether any of those elements are disputed.

The Insurers portray this case as too insignificant to merit the Court's attention. However, the case is not insignificant to Second Injury Fund claimants and disabled persons; they now face the possibility of a financially crippled agency. The case is not insignificant to current employers; they now face an increase in their assessment to subsidize the enjoined assessments against the Insurers. The case is not insignificant to every other state that uses a benefits-based assessment; they now face a potential injunction because their assessment method does not differ in any significant respect from Louisiana's current assessment method. The Court of Appeals erred, and this Court is the only court that can correct that error.

Respectfully submitted,

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